The Solicitors' Journal

VOL. LXXXVII. **Saturday, September 18, 1943.** No. 38.

Editorial, Publishing and Advertisement Offices: 29–31, Breams Buildings, London, E.C.4. Telephone: Holborn 1403.
SUBSCRIPTIONS: Orders may be sent to any newsagent in town or country, or, if preferred, direct to the above address.
Annual Subscription: £3, *post free*, payable yearly, half-yearly, or quarterly, in advance. *Single Copy:* 1s. 4d., *post free.*
ADVERTISEMENTS: Advertisements must be received not later than first post Tuesday, and be addressed to The Manager at the above address.
CONTRIBUTIONS: Contributions are cordially invited, and must be accompanied by the name and address of the author (not necessarily for publication) and be addressed to The Editor at the above address.

Current Topics.

Australia and Legal History.

WE are indebted to a reader who is a partner in a well-known firm of solicitors in Yorkshire and also a Lieutenant-Colonel in the R.T.R. for the opportunity of examining a book which came into his hands through contact with the author, effected in the Middle East. The book is "Lectures on Legal History," published in 1938 by the Law Book Company of Australia Pty., Ltd., and the author is W. J. V. Windeyer, B.A., LL.B., Barrister-at-Law, who is also a Brigadier commanding a Brigade of an Australian Division and a member of a well-known Australian legal family, his brother being in practice as a solicitor in Sydney. Brigadier Windeyer holds the D.S.O. and Bar awarded for operations in the Libyan fighting. Our reader justly observes that he does not know of any book which covers the subject so fully and neatly. It was published in 1938 and is based on lectures given by the author in the University of Sydney. The author frankly admits his indebtedness to the writings of Maitland, Pollock, Sir William Holdsworth, and many others, and the publications of the Selden Society, but points out that he has written for students knowing little history and less law. The author rightly states that there seems to be room for a short account of the history of English law, regarded not merely as the growth of a system of abstract rules, but rather as a part of the history of the English people. An interesting quotation is taken by the author from Scott's "Guy Mannering": "a lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." He examines in the most fascinating manner, without a trace of that legal antiquarianism which Dicey condemned, such subjects as "dooms," the shire-moot, the hundred-moot, compurgation, ordeal, outlawry, the king's peace, deodands, the canon law, and the hundred and one other little-known origins which have given their indelible mark to the modern institutions of English law. For those who wish to learn of the origins of quarter sessions and petty sessions, or the High Court, whether in its common law, chancery or appellate jurisdiction, there is a full and absorbingly interesting exegesis in this work. Most fascinating of all is the chapter on "The Lawyers," with a full account of the present legal professions. The section on solicitors contains one or two of the more amusing insults hurled at the profession by "lawyer-haters." One of them, uttered in 1875, when "every attorney woke up to find himself a solicitor" under the Judicature Acts, was to the effect that "a crocodile is not improved by calling him an alligator." To those interested in the history of forerunners of The Law Society of our own day, the formation of the Society of Gentleman Practisers in the Courts of Law and Equity in 1739, might prove interesting. The author pays a deserved tribute to The Law Society, founded in 1825, for its great work in elevating the profession to its present high and honourable position in the community. It is by no means strange that a work as unique as this should come from Australia, from where, as from Africa of old, there is always something new. What is strange is that the work is so little known in this country.

Law and Liberty.

JUDGING only from the legal literature that reaches these shores from the U.S.A., our American cousins are as alive as ever to the preciousness of their democratic heritage and the necessity for preserving the institutions of freedom. In "Americans on Guard," extracts from the speeches of Colonel O. R. MCGUIRE, formerly chairman of the Special Committee on Administrative Law, American Bar Association, we find it stated: "There is no place for lawyers in a despotic government" and the rise of dictatorial governments to-day is attributed to the fact that not one of the countries from which they arose stem from the English law and most of them stem from the civil law, which did not segregate legislative, executive and judicial functions of government. The *Public Administration Review* for Winter, 1943, in an article on America's Part in World Reconstruction, by HENRY A. WALLACE, Vice-President of the United States, the writer stated that "though we cannot now blue-print all the details we can begin now to think about some of the guiding principles of this world-wide new democracy we of the United Nations hope to build." The United Nations, he wrote, like the United States 155 years ago, are groping for a formula which will give the greatest possible liberty without producing anarchy and at the same time will not give so many rights to each member as to jeopardise the security of all. There has just been published by the Canadian Bar Association and republished in the series "English Studies on Criminal Science," an article by Professor SAM. WARNER, of the Harvard Law School, U.S.A., on another aspect of the laws relating to the freedom of the individual. The article is entitled "Modern Trends in the American Law of Arrest," and is of interest to lawyers in this country because, as the author states, many of the same forces are operating in England as in the United States. There are, of course, weighty differences, such as the fact that in U.S.A. all police officers and many serious offenders carry pistols. A factor which might well have its lesson for law reformers in this country is that the police in America are confident of their ability to decide when to make an arrest, how to question the prisoner, and whether there is sufficient evidence to hold him for trial —a somewhat different situation from that prevailing when there were no police forces in the modern sense, but there were a great many justices of the peace. The author states that most cities in America have paid magistrates, and it would be physically impossible for them to issue warrants for the great bulk of the arrests that occur or to examine all the persons brought in by the police for investigation. Much of the preliminary sifting in the U.S.A. is now done by the police. In spite of the smaller number of arrests in England, the author considers it likely that the substitution of stipendiary magistrates for justices of the peace will bring about the same result. To an English reader the suggestion is interesting, but at first sight repugnant. What may be an unpleasant necessity in a country like U.S.A. cannot be easily transformed into a virtue here, not so much because the police cannot be trusted to perform their proper task, but because the office of justice of the peace is looked upon as one of the institutions which preserve our liberties. In any case there has been no substantial increase in the number of stipendiary magistrates for some years past. On 5th August the Home Secretary stated in the Commons that eight county boroughs with a population of over 250,000 persons have one stipendiary magistrate each. Lack of space prevents us from further commenting on the many other interesting issues raised in this pamphlet, but we heartily recommend it to the attention of our readers.

Basic English.

THE Prime Minister, who has already given so much to the development of the English language and literature, has initiated an inquiry into the movement to establish Basic English as an international language. In his recent speech on receiving an honorary degree of Harvard University, Mr. CHURCHILL revealed that some months ago he had persuaded the British Cabinet to set up a Committee of Ministers to study and report on Basic English. The committee is under the chairmanship of Mr. L. S. AMERY (Secretary of State for India), who has a wide knowledge of languages, and other members are Mr. R. A. BUTLER (President of the Board of Education), Mr. OLIVER STANLEY (Secretary of State for the Colonies) and Mr. BRENDAN BRACKEN (Minister of Information). Apparently no meetings of the committee have yet been held, but its first meeting is to be held shortly. The terms of reference are not known, but probably they are similar

to those of the committee of the Economic Advisory Committee appointed by Mr. CHAMBERLAIN in 1939 to examine methods of teaching simplified English to those who do not speak our language. Owing to the outbreak of war shortly after the appointment of the committee, it never met. Basic English has been described as a "pocket English," as it only has 850 words. In his address Mr. CHURCHILL mentioned that the first work on Basic English was written by Mr. IVOR RICHARDS, now of Harvard University, and Mr. C. K. OGDEN, of the Orthological Institute at Cambridge. There has recently been published in this country a new translation of the New Testament into basic English, with the use of only 150 additional words. The Cambridge University Press, which is responsible for this publication, is actively preparing a version of the Old Testament in basic English. According to a letter from Mr. J. O. ROACH of Sidney Sussex College, Cambridge, to *The Times* of 9th September, the Cambridge University Local Examinations Syndicate regularly set examination question-papers on the basic English version of the New Testament and include texts in basic English as options in English Literature for the overseas Junior School Certificate. In the same issue of *The Times* the Director of the British Council, Mr. W. J. ENTWISTLE, pointed out that in teaching English the council uses basic English, among other simplified systems, ranging up to 2,500 words. All this is of the greatest interest to lawyers, who have the daily task of expounding the law and narrating facts to clients and to courts of justice. There is no doubt that the use of language for purely functional purposes, as distinct from the ornamental purposes of literature, demands the greatest degree of clarity, and the limitation of a vocabulary which is already heavily laden will conduce to that end. Moreover, architects and designers of to-day are familiar with the fact that the simplicity and functionality of design may often lead to greater beauty of design. Lawyers, however, are mainly concerned with clarity, and now that so many complaints are heard as to the unintelligibility of statutes and statutory rules and orders, it might be as well if the new committee would consider evidence as to the possibility of using basic English in some modified form for the drafting of new laws, bearing in mind the fact that laws passed in the United Kingdom occasionally become models which are used for framing legislation in the Dominions and in the colonial empire.

Juvenile Courts.

No account of the pros and cons of the controversy as to age limits for magistrates in juvenile courts would be complete without a contribution from representative magistrates themselves. That contribution was forthcoming in *The Times* of 10th September in a letter signed by Mr. BASIL L. Q. HENRIQUES, Chairman of The Toynbee Hill Juvenile Court, Mr. D. H. LINDSAY, Chairman of the Lambeth Juvenile Court, and Mr. JOHN A. F. WATSON, Chairman of the Southwark Juvenile Court. They began by stating that magistrates who sit in juvenile courts are required by statute to be specially qualified for dealing with juvenile cases. It is interesting, the letter continues, that in the opinion of so eminent a lawyer as LORD ATKIN, an opinion which he supports from practical experience in the juvenile court of a small country division, men and women over seventy comply with this requirement as well as or better than those who are younger. Many magistrates who sit regularly in the juvenile courts of large cities, where the problem of juvenile crime is largely to be found, it is stated, will disagree with LORD ATKIN. Since the passing of the Children and Young Persons Act, 1933, successive Secretaries of State have recommended that the work of juvenile courts needs to be entrusted to the younger members of the Bench, and their recommendations gained the unqualified approval of the late Lord Chief Justice. That was a view, in which the writers of the letter stated, they, who presided week by week and year by year in the juvenile courts of London, unhesitatingly concurred. In the first place, it was the duty of magistrates to supervise the work of their probation officers. How many septuagenarian magistrates regularly visited hostels and probation homes? How many magistrates of that age had personal knowledge of boys' and girls' clubs; of scouts and guides, and of the pre-service organisations; of the juvenile labour market under war-time conditions and of the snares which it sets for youth? Without such knowledge it was impossible for magistrates to carry out their duty of supervision, or even to understand the implication of the conditions which they had power to insert in a probation order. The success or failure of a juvenile court magistrate depended, before almost anything else, on his ability to see the world from the child's point of view, and because it was evident that he did so, to gain the confidence and co-operation not only of the child defendant, but also of his parents. That task was not easy in any case, and it became supremely difficult when the fact most evident to the parents was that the magistrates in relation to their child were of the grand-parental, if not of the great-grand-parental epoch. Although there might be individual septuagenarians who were able to see with the eyes of boyhood and thus gain the confidence of the anxious parents of children who were in trouble, such persons were rare indeed. There were many things which long experience taught men and women to do better in their later years than in their youth, but the work of the children's court was not among them. The writers believed that there were many experienced but elderly magistrates who, despite the protests of a few of their contemporaries, knew this to be the case. No doubt those who do not know this to be the case and those who do not agree that this is the case, will be prepared with answers to these allegations of unfitness for the work of juvenile courts. Whatever the truth of the matter be, the limitation of the supply of younger magistrates makes it essential to make quite sure that an older magistrate is unfit for work in the juvenile courts before finally deciding to dispense with his services.

District Planning.

ONE of the problems that is likely to demand the careful attention of those who are considering the planning of town and countryside now and after the war is that relating to local authority boundaries. In a letter to *The Times* of 2nd September, 1943, Sir STEPHEN TALLENTS, writing from the Ministry of Town and Country Planning, stated that uncertainty about the future boundaries of a local authority need not add substantially to its difficulties. The right planning of any area demanded the skilful adjustment of many diverse factors—geographical, social, industrial and æsthetic factors among them. These factors seldom conformed to the same frontiers, and it was rare for any of them to be confined within the administrative district of a single local authority. Such a district, therefore, could never be wisely planned in complete isolation from its neighbours. Hence joint committees, consultations between joint committees and other methods for securing combined action had been successfully employed to meet the planning need. In many parts of the country such arrangements were to-day enabling planners to go ahead with research work and planning preparations, which no doubt or anxiety about future local authority jurisdictions need seriously disturb. For no conceivable readjustment of local authority areas should rob their work of its value. In *The Times* of 4th September, Mr. J. D. TRUSTRAM EVE wrote complaining that local authorities were hampered by lack of guidance from the Government as to what their councils were to be. National planning could not take place until there was a central planning authority, not merely in relation to all the planning interests, such as the Ministry of Transport, the Ministry of Agriculture, the Board of Trade, the three service Ministries and the local authorities, not to mention many others, but also one which has authority to determine differences of opinion between the various interests concerned. A central planning authority of this nature was recommended by both the Scott and Uthwatt Committees in their reports. The absence of a central planning authority and a national plan were preventing local authorities from making their preliminary researches into the subject of local planning. In *The Times* of 6th September, Mr. J. SEELY CLARKE, Chairman of the Royal Automobile Club, and Mr. E. FRYER, Secretary of the Automobile Association, wrote pointing out that all planning schemes were substantially dependent on the lines of route which the main roads of the future were to follow. Unless the Government completed its plans very shortly there would be a hiatus even worse than after the last war. How, the writers asked, could local authorities develop their plans for good and safe roads to meet the needs of post-war traffic, housing, agriculture, etc., until they knew the intentions of the Government on this question. In *The Times* of 7th September, Mr. A. V. WILLIAMS, writing from the Town Hall, Bilston, stated that from the psychological aspect the absence of co-ordinated direction was not more discouraging than the Government's habit which showed every promise of being continued, of framing policies for rebuilding and reorganising such services as education and health without giving thought to the effect of such policies on the structure of local authorities as a whole. He asked whether it was not time that the Government took in hand the problem of devising a basic local authority unit to which all functions that were essentially local in character might be assigned. The writer said that Sir STEPHEN TALLENTS' statement that planning had no regard for local government boundaries was, in its context, unfortunate, and presented a distorted picture. No doubt the Government is aware of the effect of uncertainty with regard to the future that is felt by all who are likely to be affected by planning, and the removal of this by legislative action must be the concern of the Government in the near future.

Workmen's Compensation and the T.U.C.

AT the meeting of the Trades Union Congress on 8th September, Mr. W. P. ALLEN stated that there was a fundamental difference between the Beveridge Report and the General Council's proposals in regard to workmen's compensation. The report proposed that workmen's compensation should be part of a plan of social security, but the General Council had suggested that it should be kept outside that plan. With regard to the Government's new proposals for workmen's compensation, Mr. ARTHUR HORNER, President of the South Wales Miners' Federation, said that a serious situation was bound to arise if those proposals represented all that the Government were prepared to do. Compensation meant more to the miners than to any other industrial workers, as they lost from industrial diseases approximately 1,000 men

every year. Last year the mining industry had 120,000 men injured. First among the serious weaknesses of the proposals was the discrimination against single men. They could not drive the men to give greater production if the men felt that their wives and children would starve if they themselves were killed or injured. It is generally admitted that our present workmen's compensation system is by no means perfect, and the greatest dissatisfaction has been felt with regard to rates of payment. The new Workmen's Compensation Bill, introduced in the House of Commons on 28th July, containing the Government proposals to which Mr. HORNER referred, was the result of long discussions with the Trades Union Congress as well as the British Employers' Federation. The Home Secretary explicitly stated, on introducing the Bill, that it embodied increases in payments which were intended to be of a temporary nature, and their introduction was without prejudice to the introduction of a revised scheme of workmen's compensation which the Government had under consideration in connection with the Beveridge Report. It is a healthy sign that the public is impatient for more concrete evidence of the Government's ability to commence implementing the proposals on the Beveridge Report in the near future. There can be no doubt of the feelings of the Trades Union Congress on the subject, for on the 8th September they passed a unanimous resolution welcoming the Beveridge Report as a constructive contribution to the establishment of social security, but deploring the hesitating attitude shown by the Government towards the implementation of the report and demanding the immediate preparation of legislation.

River Boards.

THE Central Advisory Water Committee recently issued its third report (Cmd. 6465, H.M. Stationery Office, price 1s. 3d.) on questions relating to the conservation and allocation of water resources, whether measures are required for the co-ordination of the various interests, and, in particular, whether it is desirable, and, if so, feasible, to constitute new river authorities, which would be vested with the responsibility for all or some of the functions exercised by the existing bodies responsible for river control. The report states that there are more than 1,600 rural authorities, including joint committees, Fishery Boards, and some water undertakers, with statutory powers for the prevention of river pollution. There are fifty-three statutory Catchment Areas and 377 Drainage Boards, of which twenty-two are for drainage areas outside statutory catchment areas. There are forty-eight Fishery Boards, and a very large number of Navigation Authorities with powers to control navigation and levy tolls as well as to maintain and improve the rivers for navigation purposes. Over 100 of these exercise powers in tidal river waters. Excluding the Manchester Ship Canal, there are over 900 miles of canals owned by railway companies, and over 1,500 miles of canals owned by thirty-one canal undertakings, still in active use. Out of 171 ports in England and Wales, seven belong to the Government, forty are owned by railway companies, twenty-six are privately owned, forty-three are municipally owned and fifty-five are owned or controlled by commissions or boards of a representative character, and are in the nature of public trusts. It is estimated that more than two-thirds of the 1,169 statutory water undertakers of England and Wales (i.e., local authorities, joint boards and companies) derive their supplies from rivers, streams and springs, and the quantity abstracted is more than 1,000 million gallons per day. The report points to such defects as the overlapping of functions and the possibility of conflict between interests, but expresses the view that the main defect of the existing system lies in the fact that no single body is charged with the duty of co-ordinating the various river interests or with the duty of ensuring that the requirements of all such interests are fully weighed when questions affecting the river are under review. It is accordingly recommended that the various functions should be co-ordinated in the hands of comprehensive river boards so as to facilitate the pooling of financial resources of large areas and the obtaining of full-time scientific and technical staffs. The report deals with various objections to the transfer of functions to the new boards and states that there was general agreement that if new boards were formed, the administrative area should be the watershed area in the case of the larger rivers, or, if the financial resources of the areas were not sufficient to justify this course, that two or more watershed areas should be grouped under one board. The procedure for the creation of new areas and the setting up of the new boards, it is proposed, should closely follow that laid down by the Land Drainage Act, 1930, for the constitution of new catchment boards. The revenue of the boards, it is suggested, should be derived from precepts on county and county borough councils and the other sources of revenue now available for catchment and fishery boards. There should be representation of all interests, but there should be an effective majority of representatives from county and county borough councils. It cannot be doubted that the proposed new co-ordination of functions will conduce to greater efficiency in the conduct of these local services, and both local and sectional interests will be amply safeguarded by the appointment of representatives. The committee is to be congratulated on the completion of a notable piece of work.

Scope of the Arbitration Clause.

A PARTY to a contract to refer disputes to arbitration has under the law of England a perfect right to bring an action in respect of those disputes and the court has jurisdiction to try those disputes. Any provision to the contrary would be an ouster of the jurisdiction of the courts; but the court has a discretion under s. 4 of the Arbitration Act, 1889, to say whether it will try such disputes or stay the proceedings (Russell on "Arbitration," 13th ed., p. 73): "A person who agrees to arbitrate on any matter is not —unless the award of an arbitration is made a condition precedent to the bringing of an action—debarred from pursuing his common law right to bring an action, subject to this: that upon proper steps being taken a direction can be obtained that the case instead of being tried in an action should go before an arbitrator" (*Robins* v. *Goddard* [1905] 1 K.B. 294, *per* Collins, M.R.).

In a notable exposition of the law of arbitration in Scotland, Lord Dunedin, in *Sanderson* v. *Armour* [1922] S.C. (H.L.) 117, made it clear that where an arbitration clause in a contract is of a universal character submitting all disputes which may arise either in the carrying out of the contract or in respect of a breach of the contract, any question between the parties relating to the contract fell to be determined under the arbitration clause. "The English common law doctrine eventually swept away by the Arbitration Act of 1889—that a contract to oust the jurisdiction of the court was against public policy and invalid—never obtained in Scotland. In the same way the right which in England pertains to the court under that Act to apply or not to apply the Arbitration Act in its discretion never was the right of the court in Scotland. If the parties contract to arbitrate to arbitration they must go." That fundamental distinction between the two systems of law should be borne in mind.

Subsequent to *Sanderson's* case, Lord President Clyde, in *Hoth* v. *Cowen* [1926] S.C. 58, observed: "A contract the existence of which is disputed must first be set up before it can be enforced, and this applies as much to an arbitration clause as to any other kind of clause contained in it." In that case, the court found that the issue between the parties was whether a tenant possessed under an old lease or under a new bargain, and that as the lease itself was in dispute, an arbitration clause in the lease did not apply.

So far as Scots law is concerned, that judgment does not appear to be in line with *Sanderson* v. *Armour*. As Mr. Guild puts it ("Arbitration," p. 45): "In the ordinary case A comes into court alleging that B is in breach of contract, and that the breach complained of goes to the root of the contract and amounts to repudiation. Such averments, if denied, are not sufficient to elide the provisions of an arbitration clause conceived in terms apt to cover any dispute arising under the contract, otherwise, as Lord Dunedin points out, no arbitration clause, however general, would be of any avail. In the case figured, the dispute must go to the arbiter if the arbitration clause is wide enough to cover the subject-matter."

The like question arises when it is pleaded that a contract containing an arbitration clause is frustrated. Is the question whether the contract is frustrated or not, one which it is competent to try under the arbitration clause. In the case of *Cheong Yue Steamship Co.* [1926] A.C. 497, Lord Sumner said: "The arbitration clause is but part of the contract, and unless it is couched in such terms as will except it out of the results which follow from frustration generally, it will come to an end too. This must be so if the law is that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen." And, again: "A person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it. His authority depends on the existence of some submission to him by the parties. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction."

This seems like begging the question, for the facts might show that the contract had not been frustrated, and that therefore the arbitration clause had not lapsed, but it is here that the discretionary power which the court in England possesses comes in. The exact point came up in *Grey* v. *Tolme and Runge* (1914), 31 T.L.R. 137, where it was held that as the question between the parties was whether in consequence of frustration the contract was alive or dead it was in the judge's discretion to say that that was not a proper question to be submitted to arbitration.

Under the Agricultural Holdings Acts, statutory arbitrations are set up. In England the Agricultural Holdings Act, 1923, s. 16 (1), provides:—

> "Any question or difference arising out of any claims by the tenant of a holding against the landlord for compensation payable under this Act or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant or for any breach of contract or otherwise in respect of the holding and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the

tenancy of the holding or arising whether during the tenancy or on the termination thereof as to the construction of the contract of tenancy or any other question which under this Act is referred to arbitration shall be determined notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration by a single arbitrator in accordance with the provisions set out in the second section to this Act."

In *Simpson* v. *Batey* [1924] 2 K.B. 666, tenants gave notice to quit on a certain day. When the day arrived they refused to give up possession. The landlord brought an action of ejectment. The tenants applied to stay the action in respect of the above section. It was held that the question between the parties, being whether the tenancy had or had not terminated, was not a question or difference arising out of the termination of the tenancy and was therefore not within the section. "These words," said Bankes, L.J., "describe differences where it is not disputed the contract has determined and have no application where the question at issue is whether the tenancy has determined or not." And Warrington, L.J., observed: "How that section can include a case where the whole question is whether the tenancy of the holding has or has not terminated is more than I can understand."

Section 32 of the Agricultural Holdings (Scotland) Act, 1931, enacts that any question or difference between the landlord and the tenant of a holding arising out of any claim by the tenant against the landlord for compensation, or out of any claim by the tenant against the landlord for compensation, or out of any claim by either party against the other for breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant, or as to the construction of the lease, *and any other question or difference of any kind whatsoever between the landlord and the tenant arising out of the tenancy or in connection with the holding* (not being a question or difference as to liability for rent) shall, whether such question or difference arises during the currency or on the termination of the tenancy, be determined by arbitration.

An important question as to the meaning of that provision was raised by *Fairholme's Trustees* v. *Graham* [1943] S.L.T. 159. That was an action by landlords for a declaration that the contract of tenancy was founded on the terms of a draft lease and for payment of arrears of rent. In defence it was averred that the contract was founded on certain informal writings exchanged between the parties, and the defendants counterclaimed for damages in respect of the pursuers having failed to carry out the obligations of the contract as contained in these writings. The defendants then pleaded that the whole dispute fell to be decided by arbitration under s. 32. It was held that the section did not entitle the arbiter to determine the basis of the contract and the pursuers' claim was accordingly retained in court for trial. We give Lord Keith's analysis of the section leading up to that finding:—

"Now if the arbiter has jurisdiction to consider what is the contract of tenancy, the matter is simple. I would sift the case and remit the whole questions in dispute to the arbiter. But, although the matter does not appear to have arisen before, I have formed an opinion, right or wrong, that the section does not entitle the arbiter, where there is a dispute between parties as to what constitutes the contract of tenancy, to determine that matter. The section refers to a large number of matters that the arbiter has got exclusive jurisdiction to determine. The first is: Any question or difference between the landlord and the tenant of a holding arising out of any claim by the tenant against the landlord for compensation under this Act or any Act by this Act repealed. Now I see nothing to suppose that that does not imply that parties are agreed *in initialibus* upon the contract out of which the question of difference arises. It further proceeds to refer to any question or difference arising out of any claim by either party against the other for breach of contract. Well, now, breach of contract again, it seems to me, assumes that parties are agreed on what the contract is. It continues, or otherwise in respect of the holding or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant. I don't know that these words lend any assistance in construing the section, because I think these are claims that might arise independently of any express terms in any contract. Then the Act proceeds to refer to a question or difference as to the construction of the lease. There again it seems to me plain that the lease must be an admitted or an accepted document before the arbiter can be asked to construe it. The section continues: 'and any other question or difference of any kind whatsoever between the landlord and the tenant arising out of the tenancy or in connection with the holding' (not being a question or difference as to liability for rent). That clause in the statute perhaps is the most favourable clause to the defender's contention, but it is to be noted that what is referred to there is any other question or difference . . . arising out of the tenancy, and I think there again that the tenancy implies a tenancy known to and accepted by the parties not a tenancy the basis of which is in dispute between the parties."

The grounds for holding the arbitration clause inapplicable were certainly much stronger in *Fairholmes Trustees* v. *Graham* than in the other cases above cited, but nevertheless why this apparent anxiety to restrict the scope of the arbitration clause? So far as Scots law is concerned the arbitration clauses of the Agricultural Holdings Act were designedly widened in 1931, so that now practically every question or difference arising in connection with the holding (excepting certain special valuations at termination of the tenancy) must be referred to arbitration under the Act. In the case of *Cameron* v. *Nicol* [1929] S.L.T. 653, it was held that to bring in the compulsory arbitration provisions of the 1923 Act, the relationship of landlord and tenant must exist between the parties, and this ruling is, in effect, now given with regard to the provisions of the 1931 Act. Our readers will observe the words in the section quoted—which we have italicised and we put it to them whether these have received their due weight. Is not the statutory arbitration clause in Lord Dunedin's words: "of the ample variety which includes every form of dispute"? Or, notwithstanding that, are we still in the position that if the contract is in dispute the arbiter has no jurisdiction?

A Conveyancer's Diary.

Debts Owing by Legatees.

My recent article on statute-barred debts owed by legatees to a testator or intestate (87 Sol. J. 305) has brought me a letter inquiring whether I have not overlooked *Re Taylor* [1894] 1 Ch. 671. I admit that it had escaped me; but I think that it serves to illustrate and particularise the point with which I was dealing. My former article dealt specifically with the position of statute-barred debts: *Re Taylor* does not, but is one of a line of cases on a more general doctrine, which I now proceed to discuss.

In *Re Taylor* the testator in his will bequeathed to or in trust for various persons pecuniary legacies amounting in the aggregate to £25,000. He then recited that he had lent to one Herbert Taylor the sum of £5,600 on promissory notes, which sum was still owing, that being the amount of Herbert Taylor's contribution to the capital of a firm in which he and the testator were both interested as partners. The testator went on to direct his trustees to take his place in the business and gave the profits arising therefrom to Herbert Taylor during his life and the minority of the testator's son. The testator died in February, 1891, and in May of the same year Herbert Taylor assigned all his share and interest in the capital and profits of the business to trustees for the benefit of his creditors. The testator's executors duly took the testator's place in carrying on the business and in due course collected a sum of £1,250, which was in their hands as the testator's share of the profits during a certain period. The summons was taken out to resolve whether the trustees ought to "retain" such sums, and any further similar sums, in or towards payment of the sums due to the testator's estate by Herbert Taylor or whether they ought to pay the whole or any part thereof to the trustees of the assignment for the benefit of Herbert Taylor's creditors. Chitty, J., delivered a very concise judgment. He stated that it was argued on behalf of Herbert Taylor's assignees that there was no right of retainer because the gift to Herbert was specific and "the law is settled that as against a specific devise which is outside the duties of the executors there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds there is likewise no right of retainer. The two things cannot be measured one against the other, and the same rule prevails also in the case of specific chattels. If in such cases the right did exist, it would be, not a right of retainer, but of lien . . . But I find here on either side a liquidated demand. The executors have money in hand payable to the legatee, and I think I should be unnecessarily narrowing the doctrine of retainer were I to hold that the right did not exist in this case. The person to pay and the person to receive is the same. The mass of the estate is diminished by the non-payment of a debt which is due to the testator's estate from the legatee. In my opinion, the executors have the right of retaining these profits as against the debt due from the legatee." This decision seems to modify the position taken up by Kekewich, J., in *Re Akerman* [1891] 3 Ch. 212, if I am correct in interpreting the passage in his judgment from the bottom of p. 217 to the middle of p. 218 as implying that the doctrine of "retainer" (in this sense, not to be confused with its commoner meaning) only applies where the beneficiary is indebted *to the same fund* as that which has to provide his legacy. The position under *Re Taylor* appears to be that the doctrine applies where one and the same person is to pay as personal representative and to give a receipt as creditor, *and* where the subject-matter is liquidated sums to pass in each direction. The doctrine is not, of course, confined to the cases where the debts are statute-barred. In *Re Savage* [1918] 2 Ch. 146 it was again discussed in connection with a statute-barred debt. In that case a testatrix, by a will dated 1896, gave four specific sums of stock to A. In 1903 A borrowed £500 from the testatrix, but paid no interest on it and gave no acknowledgment after 1904. The debt therefore became statute-barred in 1910. The testatrix died in 1917. It was very strongly argued that the stocks (which were issues of two Australian states) were easily convertible into money and were therefore in exactly the same position as money would be, with the consequence that part of

them must be retained to meet the £500 debt. Sargant, J., however, rejected this argument. Relying on observations of Lord Cottenham, L.C., in *Cherry* v. *Boultbee*, 4 Myl. & Cr. 442, at p. 447, he stated that "You can only exercise the right of retainer in respect of a debt which is due and against a cross-payment to the debtor." He then cited *Re Taylor*, saying that "Chitty, J., recognises what is laid down by Lord Cottenham in the passage which I have quoted from *Cherry* v. *Boultbee* that to have the right of retainer there must be money in the shape of a debt on the one side and money on the other side. If what the executor holds for the legatee is not money, he cannot pay himself the debt out of it by way of retainer, and admittedly he has no right of lien." Sargant, J., then said that he did not consider that the stocks were or could be treated as money for this purpose, mentioning incidentally that some chattels have a more definite and realisable money value than some stocks or shares. That being so, he held that there was no right to retain in the case before him.

The position seems thus to be reasonably clear, but, with great respect, I am not sure how logical it is. *Re Akerman*, as I understand it, proceeds on the principle that a person who is entitled to something out of a "mass" cannot be allowed to take that something so long as he remains liable, as a debtor, to increase that same mass. That seems logical, and the general principle does not apply only to the estates of deceased persons (see *Re Peruvian Railway Construction Co., Ltd.* [1915] 2 Ch. 144 and 442, where it was applied to a company in liquidation). But once one gets away from the clear conception of debits and credits in respect of a single fund, it seems very difficult to draw a consistent line. Thus, I quite see that the doctrine, which is an old one, could not have applied to specific devisees of land, because, before comparatively recent legislation, the testator's realty did not come to his executors who were the persons responsible for collecting debts due to him. That is clearly what lies behind the observations of Chitty, J., in *Re Taylor*, that the doctrine had no application to a specific devise "which is outside the duties of the executors." But the same argument could not be used of a specific bequest of leaseholds or specific chattels, as to which he said the law was the same. I imagine that that logical difficulty accounts for the introduction of the idea that debts and leaseholds were incommensurable, which appears in the next sentence in the judgment of Chitty, J., and which, being extended to stocks, was the ground upon which *Re Savage* was decided. I see the justice of saying that there is no reason why a specific legatee should be made to pay up for the benefit of the estate generally and of the residuary legatees; the testator has chosen to give the asset specifically to the legatee without making it a condition of the bounty that the debt should be paid off. Why then should the court step in? The dialectical difficulties really seem to arise because Chitty, J., in *Re Taylor*, was prepared to differentiate what was in effect a specific legacy of cash from all other sorts of specific legacy. It is pretty clearly too late now to say that he was wrong; but the present position is not very satisfactory, whether or not my diagnosis of its origin is correct. For example, if B is indebted to A in a sum of £500 and A leaves to B the benefit of an investment of £1,000 on first mortgage of freeholds, what is the position? It is ridiculous to say that such an asset is "incommensurable" with B's debt, but it is not money in hand. Again, suppose that what A does is to leave to his trustees a rent-charge of which he was estate owner in fee simple on trust to collect the moneys and pay them to B during his life; is this case one of a specific devise for life (as to which there is no retainer), or is the dominant fact that the trustees having collected an instalment of the rent will have money in hand to retain? These points seem difficult to solve in view of the illogical state of the authorities.

Obituary.

SIR RAYMOND WOODS.

Sir Raymond Wybrow Woods, C.B.E., solicitor to the Post Office since 1921, died on Sunday, 12th September, aged sixty-one. He was educated at the Cathedral School, Hereford, and after serving as chief clerk in the solicitors' department of the Treasury, he was appointed in 1917 secretary to H.M. Procurator-General at the prize department. In 1918 he was made C.B.E., and in 1921 was appointed solicitor to the Post Office. He received the honour of knighthood in 1909.

MR. C. J. F. ATKINSON.

Mr. Charles Joshua Fearnside Atkinson, solicitor, and senior partner in Messrs. Atkinson, Dacre & Slack, solicitors, of Otley, Yorks, died recently, aged seventy-five. He was admitted in 1890, and was registrar of the county courts at Otley, Keighley and Skipton.

MR. G. J. B. PORTER.

Mr. George Joseph Bayspool Porter, solicitor and senior partner in Messrs. Farrar, Porter & Co., solicitors, of Doctor's Commons, E.C.4, died on Sunday, 12th September, aged eighty. He was admitted in 1885.

Landlord and Tenant Notebook.

Covenant against Alienation: the Implied Proviso.

WHEN L.T.A., 1927, was passed, and by s. 19 (1) imported into any covenant "against assigning, underletting, charging or parting with the possession of demised premises or any part thereof *without licence or consent*" a proviso that "such licence or consent is not to be unreasonably withheld," there was a certain amount of speculation on the question whether this would lead to the drafting of leases prohibiting alienation absolutely. It was suggested that the statutory proviso would not or might not apply to such a case. There has so far been no decision on the point, but there have been at least two judicial *obiter dicta* which support the view that the proviso operates only when the covenant provides for consent.

Lilley & Skinner, Ltd. v. *Crump* (1929), 73 SOL. J., was an action for a declaration. The plaintiffs held a lease which prohibited them from cutting main walls. It also prohibited them from making alterations without the consent of the defendant their landlord. By s. 19 (2) of L.T.A., 1927, i.e., the subsection following that dealing with covenants against alienation, covenants "against the making of improvements without licence or consent" are likewise deemed to be subject to a proviso "that such licence or consent is not to be unreasonably withheld." The plaintiffs sought consent to the making of openings in a party wall dividing the demised premises from others which they occupied. The landlord said this was a proposal to cut a main wall and the covenant against alterations had nothing to do with it.

It seems to have been agreed that "improvements" in s. 19 (2) meant, or at all events covered, alterations which would effect improvements, and agreed or held that the proposed alteration would amount to an improvement. At all events, Rowlatt, J., treated the question as one whether the work proposed was merely an alteration not to be done without consent, or a cutting or maiming not to be done on any account. And his lordship decided that the mere fact that an aperture was to be made in the main wall did not make the operation *ipso facto* a cutting as against an alteration. The learned judge likened the operation to the enlargement of a window or carrying a pipe through a main wall.

I am not sure myself that this judgment can rightly be said to imply, or necessarily to imply, that the "consent not to be unreasonably withheld" proviso does not attach to an unqualified covenant prohibiting the making of improvements. The learned judge arrived at his conclusion by placing a somewhat narrow construction on the covenant against cutting and maiming, practically reading it as a covenant not so to cut and maim as to injure the inheritance. The assumption that what one of the two covenants discussed covered must be outside the scope of the other is certainly open to criticism; there is some connection between the making of omelettes and the breaking of eggs.

However, in the course of his judgment in *F. W. Woolworth and Co.* v. *Lambert* [1936] 1 Ch. 415, Clauson, J., observed: "It appears to be agreed by counsel in this case—and their agreement seems to be justified by a decision of Rowlatt, J., in *Lilley & Skinner, Ltd.* v. *Crump*, that while subs. (2) of s. 19 will apply to a covenant which contains the words 'without licence or consent,' it will not apply to a covenant expressed absolutely and without the words 'without licence or consent'." This was said *obiter* because the learned judge had already given "a somewhat benevolent construction" to the clause before him, which prohibited both the erecting of other buildings and the making of structural alterations; it was clear that the words "without the previous consent in writing of the lessors" qualified the former, less clear that they applied to the latter, but his lordship assumed that the lease "contained a covenant that the lessees would not without the consent in writing of the lessors make or suffer to be made any structural alterations to the demised premises."

But what is particularly interesting for present purposes is the passage which follows the reference to *Lilley & Skinner, Ltd.* v. *Crump*: "... subs. (2) of s. 19 ... will not apply to a covenant expressed absolutely," etc. His lordship proceeded: "It is curious that it should be so, because, if it is so, in future leases a lessor who desires to be outside this subsection need only insist on the omission of the words 'without licence or consent' which will not in the least prevent his giving a licence or consent to a breach of covenant expressed in general terms."

No experienced practitioner will take much exception to the suggestion of insistence by lessors, who are usually in a better bargaining position than intending tenants; nor can it be said that the giving of a licence expressed in general terms would necessarily be a much more cumbersome proceeding than the giving of a licence specifically called for by the lease. But the question has been mooted: Is this "curious" result indeed brought about; and, if so, does the same reasoning apply to s. 19 (1), so that an absolute covenant against alienation is outside that subsection?

The main argument against this "curious" result would be that the Legislature cannot have intended it. The argument

may be advanced—for what it is worth—that Parliament would hardly leave so inviting an avenue for the traditional coach-and-six.

But the answer would be this: both subsections refer to "such" licence or consent, and it is impossible to give effect to the "such" otherwise than by relating it to the earlier "without licence or consent" in each case. There is no ambiguity, and it is by no means certain that the intention was to confer the greater freedom on all tenants.

When one further compares the two subsections, it would seem that anyone arguing for liberal interpretation of s. 19 (1) would have a harder task than that which confronts one contending for such treatment in the case of s. 19 (2). For the subject-matter of the latter is described as "a covenant . . . against the making of improvements." The judgment of Rowlatt, J., in *Lilley & Skinner, Ltd.* v. *Crump* certainly implies that "a covenant against the making of improvements" covers a class of covenants, i.e., all covenants which would prevent the making of improvements, in so far as they prevent such. This was thoroughly thrashed out by Luxmoore, J., in *Balls Bros., Ltd.* v. *Sinclair* [1931] 2 Ch. 325: "Personally I have never heard of 'a covenant against making improvements' *totidem verbis*, nor have counsel engaged in the case." This view was adopted in *F. W. Woolworth & Co.* v. *Lambert*, *supra*, and by the Court of Appeal ([1937] Ch. 37).

But in the case of the covenant against alienation, it rather looks as if the draftsman *had* thought of everything. "A covenant . . . against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent" are the words used, and this suggests awareness of that series of decisions commencing with *Gentle* v. *Faulkner* [1900] 2 Q.B. 267 (C.A.) and terminating with *Chaplin* v. *Smith* [1926] 1 K.B. 198 (C.A.), in which nice distinctions were drawn between the meanings of the expressions set out in the subsection. Parting with occupation, as well as possession, which was a feature of the covenant discussed in *Jackson* v. *Simons* [1923] 1 Ch. 373, may have been deliberately omitted from the subsection.

Another point would be this: if the subsection is to apply to any covenant which has the effect of prohibiting alienation, whether qualified by "without consent" or not, it would apply to covenants, sometimes met with in the cases of farms and public-houses, for personal residence. If Parliament intended to extend qualified freedom to such, the covenants would have been specifically mentioned. On a balance of considerations, then, I submit that it is open to landlords to take the course suggested by Clauson, J.

To-day and Yesterday.

LEGAL CALENDAR.

September 13.—Michael de Montaigne, the great French essayist, who died on the 13th September, 1592, was, like so many literary men, at first a lawyer. He began his legal studies at the age of thirteen and in 1554 he became a counsellor in the courts at Bordeaux. He married the daughter of one of his colleagues there. In 1571 he gave up practice and retired to his family estate at Montaigne to devote the rest of his life to study, contemplation and literature. Only occasionally do his writings touch upon the law. In his essay on cruelty he expresses the opinion that in executions "whatever exceeds simple death is mere cruelty," and that one "ought to have so much respect to the souls as to dismiss them in a good state, which cannot be when they are discomposed and rendered desperate by intolerable torments." He suggests that the "examples of severity, which are with a design to keep people in their duty, might be exercised upon the dead bodies of criminals, for depriving them of burial and quartering and boiling them would impress the vulgar almost as much as the pains they see inflicted upon the living."

September 14.—In English criminal history Mrs. Elizabeth Brownrigg has a high notoriety for cruelty. The wife of a busy plumber living in Flower de Luce Court, Fleet Street, she had charge of the poor women in the workhouse of the Parish of St. Dunstan's. It was easy for her to take in friendless orphan girls as servant apprentices whom she treated with vicious cruelty. She constantly tied them up and beat them to blood. One she forced to sleep on sacking and straw in the coal hole, feeding her on bread and water, and not much of that. She fastened a chain round her neck and once cut her tongue with scissors. Eventually the facts came to light, but not soon enough to save the life of the victim, who died in St. Bartholomew's Hospital. Mrs. Brownrigg was convicted of murder and hanged at Tyburn on the 14th September, 1767. Her body was dissected at Surgeon's Hall, where her skeleton was afterwards exhibited. Her husband and son were found guilty on a minor charge and imprisoned for six months.

September 15.—On the 15th September, 1685, while the "Bloody Assizes" were in full swing, Henry Muddiman, in his newsletter, summed up the results of the trials at Dorchester: "Of the 13 who were executed at Dorchester on the 7th, their heads and quarters were hanged up on poles there. The rest, who received sentence on the 10th were ordered to be executed in other the most remarkable places in the county. Of those who pleaded guilty, 251 received sentence of death, of whom 61 are to be executed. Lyme being the place where they first landed will see the end of 12 of the most considerable of them." Of those thus condemned for rising to support the Duke of Monmouth's invasion, ten were to be executed at Bridport on the 12th, twelve at Weymouth and Melcombe Regis on the 15th, eleven at Sherborne on the 15th, and others elsewhere.

September 16.—On the 16th September, 1746, "the court martial, General Wentworth president, unanimously acquitted Col. Durand, late governor of Carlisle, it appearing that he defended the place as long and as resolutely as could be expected with so small a garrison." Prince Charlie's invasion of England had found the town quite unfit to stand a siege being defended only by an ill-disciplined militia, newly raised and insufficient in numbers to man the walls, while about eighty old soldiers, only half of them fit for service, guarded the castle.

September 17.—On the 17th September, 1745, at the sessions at the London Guildhall, "a great number of persons were fined for serving in their shops on the Sabbath day."

September 18.—On the 18th September, 1683, Evelyn wrote: "After dinner I walked to survey the sad demolition of Clarendon House, that costly and only sumptuous palace of the late Lord Chancellor Hyde, where I have often been so cheerful with him and sometimes so sad: happening to make him a visit but the day before he fled from the angry Parliament, accusing him of maladministration, and being envious at his grandeur, who from a private lawyer came to be father-in-law to the Duke of York, and as some would suggest, designing his Majesty's marriage with the Infanta of Portugal, not apt to breed; to this they imputed much of our unhappiness, and that he being sole minister and favourite at his Majesty's restoration, neglected to gratify the King's suffering party, preferring those who were the cause of our troubles. But perhaps as many of these things were injuriously laid to his charge, so he kept the government far steadier than it has proved since. I could name some who I think contributed greatly to his ruin, the buffoons and the misses to whom he was an eye-sore. 'Tis true he was of a jolly temper after the old English fashion; but France had now the ascendant, and we became quite another nation. The Chancellor gone and dying in exile, the Earl, his successor, sold that which cost £50,000 building to the young Duke of Albemarle for £25,000."

September 19.—After an unsuccessful spell in business as a butcher, William Johnson served for a while as surgeon's mate with the garrison at Gibraltar. On returning to civil life he soon spent his savings and turned highwayman. He associated with a woman called Jane Housden and when she was arrested on a charge of coining he attempted to speak to her just as she was being brought into court at the Old Bailey. The head turnkey told him he must wait till after the trial, whereupon he instantly drew a pistol and shot him dead in the presence of the judges, the woman encouraging him to it. They were both immediately tried for murder, and on the 19th September, 1714, they were hanged together, neither showing any sign of repentance.

Road Accidents to Judges.

Bow Street Police Court lately had the unexpected privilege of seeing Lord Justice du Parcq in the witness box when he came forward to testify how he had been knocked down by a motor car while crossing the Strand on his way to the Law Courts. Usually the vigilance of the police adequately protects the members of the judiciary on the stretch of road by Temple Bar, but the accident is not unprecedented, for Sir Samuel Evans, when President of the Divorce Division, was once bowled over by a taxi. That must have been the very incident recalled by a cab driver a few years ago when he was reproached by a passenger for going round by the Embankment instead of straight down Fleet Street; he said he never passed the courts even during vacation, explaining: "You see, sir, it's like this. I once ran over a judge. It was awful!" Lord Buckmaster and Lord Darling were both knocked down by motor cars in their time, and in slower days Mr. Justice Day even contrived to be run over by a horse-cab on the Embankment. With great presence of mind the passenger leapt out in time to lessen the weight as the wheel passed over him and the judge was well enough to dine with Lord Coleridge the same evening. His wife, however, was too upset to go. Her husband explained to his host: "Here is the one that met with the accident; the one who suffers from it is at home." One of Day's sons has described how his pedestrianism "smacked of the primeval and heroic," telling how he would wait till the road seemed clear and then dart across it looking neither to right nor left. "Yet even his enemies did not contend that he often broke bones or walked otherwise than politely over a wayfarer who in the shock had lost his balance." Lord Justice Goddard when he was a judge of the King's Bench and holding the Manchester Assizes once chased in the Sheriff of Lancashire's car a motorist who had been guilty of a piece of careless driving and whom he brought to justice. Similarly, Lord Roche once paced a lorry driver exceeding the speed limit and gave evidence at Woodstock which led to his conviction.

Our County Court Letter.

Alleged Gift of a House.

In *Jones* v. *Furney*, at Monmouth County Court, the claim was for £24 16s. 3d. as arrears of rent and rates. The plaintiff was ill, but proceedings had been taken on his behalf by his chief witness, under a power of attorney. The plaintiff's case was that on the 1st May, 1935, the defendant had signed the following document: "I agree to rent the cottage on the Cross, Llanishen, and to pay four shillings a week rent and rates." The defendant had paid the rent up to September, 1941, and the rates up to March, 1942. In October, 1942, the defendant made the suggestion, for the first time, in a letter from her solicitors, that the house had been the subject of a gift to her and that she had paid the plaintiff £40. The latter suggestion had since been abandoned, but the claim with regard to the gift was persisted in. It was pointed out on behalf of the plaintiff that there could be no gift of real estate in the absence of a deed of conveyance. The defendant's case was that in 1939 her husband had died. In September, 1941, she had seen the plaintiff, who proposed to hand over to her the deeds of the cottage, but he was unable to find them in his deed box. His Honour Judge Thomas gave judgment for the plaintiff for the amount claimed, with costs.

Alternative Accommodation.

In *Nock* v. *Allport*, at Stourbridge County Court, the plaintiff was a miner and he claimed possession of 43, Chapel Street, Lye. He offered as alternative accommodation the house in which he himself was residing, viz., 3, Chapel Street, Lye. This was offered to the defendant at a weekly rent of 7s. 3d., being the same rent as she was now paying. The plaintiff admitted, however, that before he bought the premises, forty years ago, he had only paid 3s. 6d. a week rent. The defendant's case was, that it was not reasonable to make an order for possession under the Rent, etc., Restrictions (Amendment) Act, 1933, s. 3 (1) (*b*). The defendant had lived at 43, Chapel Street for thirty-three years, and although No. 3 was admittedly nearer the church, at which the defendant was a worker, the alternative accommodation was not suitable. His Honour Judge Roope-Reeve, K.C., held that it was reasonable for the plaintiff to wish to live in his own house. An order was accordingly made for possession in twenty-eight days, with costs on Scale A. It was to be apprehended, however, that litigation might ensue in regard to the rent of 7s. 3d. of No. 3. It might transpire that the standard rent was only 3s. 6d.

Standard Rent of Dwelling-house.

In *Gladwin* v. *Sherrington*, at Ledbury County Court, the claim was for £1 15s. as arrears of rent. The counter-claim was for £15 10s. as overpaid rent. The plaintiff's case was that on the 24th June, 1929, a shop and dwelling-house were let to the defendant for seven years at a rent of 12s. 6d. per week for the first three months and thereafter at 15s. The defendant continued in occupation after the expiration of the lease, and in 1939, in response to his plea of bad trade, the rent was reduced to 12s. 6d. Nevertheless this was only temporary, and the amount claimed represented the difference between 12s. 6d. and 15s. for the period in dispute. The defendant's case was that it was necessary to go back to 1904 to ascertain the standard rent, which was 3s. 9d. per week on the 4th August, 1914. The defendant had therefore paid 104 weeks at 12s. 6d., instead of 3s. 9d., and he claimed to recover the amount so overpaid. His Honour Judge Roope-Reeve, K.C., held that the amount due for rent was 12s. 6d. per week. The claim therefore failed. The counter-claim was dismissed on the ground that there was no evidence that the standard rent had ever been less than 12s. 6d. per week. No costs were allowed to either side.

Determination of Standard Rent.

In *Miles* v. *Kirby*, at Stroud County Court, an application was made under the Rent, etc., Restrictions Act, 1923, s. 11, for the determination of the standard rent of a dwelling-house. The plaintiff's case was that he had been bombed out of his house in London, and was unaware of the value of the house when he agreed to pay £1 5s. a week rent. This amount was excessive. The defendant's case was that he was an airman, serving overseas, and any reduction of rent would cause him hardship. His Honour Judge Kirkhouse Jenkins, K.C., held that he was not entitled to take into account any of the above points, on either side. If Parliament desired to be generous to members of the armed forces, further legislation was necessary. On the law as it stood, and having viewed the premises, he fixed the rent at £1 1s. a week. This was a reduction of 4s., and would allow the landlord what he could expect as a normal profit. The order would be retrospective, and was ante-dated three months. No costs were allowed to either side. It is to be noted that the above section enables the court to determine the amount of the standard rent as an abstract question. Compare s. 6 of the Rent, etc., Restrictions (Amendment) Act, 1933, enabling the court to determine the standard rent by comparison with the rents of similar houses in the neighbourhood.

Points in Practice.

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered, without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 29–31, Breams Buildings, E.C.4, and contain the name and address of the subscriber, and a stamped addressed envelope.

Commission for Introducing Business.

Q. Under the Solicitors Practice Rules, 1936, a solicitor may not share profit costs with an unqualified person. The case of *Lake* v. *Bartlett & Gluckstein* (1921), 37 T.L.R. 316, decided that an agreement between a solicitor and an unqualified person to pay remuneration to such person in respect of business introduced to the solicitor was legal. The Solicitors Practice Rules were made under s. 1 of the Solicitors Act, 1933. Can it be assumed that the rules now supersede the decision quoted above?

A. Possibly some time the meaning of the words "profit costs" in the rules may have to be decided. The term is commonly used to mean the charges of a solicitor as opposed to disbursements, though of course the charges are not "profit" in any proper sense. It is considered that the intention of the Council of The Law Society was to make illegal an agreement to share charges either in respect of one transaction or generally. On the other hand, it is considered that the case of *Lake* v. *Bartlett & Gluckstein* is still an authority for the proposition that it is legal to pay an unqualified person for introducing business, providing it has not any precise relation to the amount of the charges for such business.

Will—Construction—Precatory Trust or No Trust.

Q. A by his will gave "all moneys due on his estate to his wife for use as she thinks best for herself and our children," and also gave a house to her "to do what she wishes for the benefit of herself and our children." He appointed no executors and letters of administration with the will annexed were granted to the wife and another. We should be glad to be advised as to the proper construction to be placed on the will, that is to say:—

(*a*) Is it a gift to the wife absolutely, or

(*b*) Does it constitute a trust for the wife and the children, or how otherwise?

The estate consisted of household and personal effects, cash, proceeds of life insurance policies and the house above referred to, so that the bequests in the will may be taken to comprise the whole of his estate which was of a total value of some £2,300.

A. We express the opinion that the wife takes absolutely (*M'Alindur* v. *M'Alindur*, 11 Ir. R. Eq. 219). In that case the property was given to the wife "to be used by her in such ways and means as she may consider best for her own benefit and that of my three children." See also *Lambe* v. *Eames*, 10 Eq. 267; L.R. 6 Ch. 597.

Estate Duty—Company under Control of not more than Five Persons.

Q. In 1919 three brothers trading in partnership converted their business into a limited company, transferring the business to the company for shares in the usual manner. The company has expanded, a substantial preference issue has been raised and all the shares, both preference and ordinary, are quoted on the Stock Exchange, but the ordinary shares are still substantially held by the three brothers, and the company is, therefore, under the control of less than five persons. The dealings in the ordinary shares are so few that their quoted value is below the value of the company's assets as a going concern after payment of all liabilities including the preference capital. It is suggested that, although the formation of the company and the sale of the business to it took place over twenty years ago, and was a perfectly straightforward commercial transaction, nevertheless, this constitutes a transfer of property by the brothers to the company and that the Finance Act, 1940, s. 46 *et seq.*, applies for purposes of estate duty should any of the three brothers die. Is this correct?

A. If the public hold 25 per cent. of the ordinary shares and there is a Stock Exchange quotation, the sections referred to of the Act of 1940 do not apply. As to who are the public, see *Tatem Steam Navigation Co.* v. *I.R.C.* [1941] 2 K.B. 194.

Maintenance Claim.

Q. Testator left certain property in trust, the income of which was to be paid to his daughter for life. Extensive repairs, necessary during the life of the testator, were completed by his trustees and charged against capital, and consequently a maintenance claim was lodged with the inspector of taxes and a repayment obtained. At no time during the period were repairs charged against income sufficient to cover the repairs allowance. Would you state whether the tax repayment should be credited to income or capital.

A. As a matter of equity, where the cost of repairs has been paid out of capital, the reclaimed tax should, it is considered, be credited to capital. It is in fact an owner's claim, though the daughter would be regarded as owner if the repairs were paid for by her, or out of money that would otherwise be payable to her.

Correspondence.

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL.*]*

Tax and War Damage Payments.

Sir,—The Estate Duty and Tax Authorities have now taken up the position that all war damage will ultimately be made good out of the War Damage Fund, and duties and excess profits tax are being levied upon this basis. The view of the bureaucracy has now been upheld by the courts in the case of *Inland Revenue Commissioners* v. *Terence Byron, Ltd.*, 106 L.T. 57; 36 R. & I.T. 270. It is now generally admitted that value payments based on 1939 values can have no relation whatsoever to post-war replacement costs. So far as I am aware no figures have been published by the War Damage Commission as to the probable total amount of value payments claimed in respect of destroyed properties. In the absence of official data, estimates of the total extent of damage vary very considerably. It is at least open to doubt whether the compensation fund available under the War Damage Act will in fact foot the total bill for cost of works and value payments. Pending publication of official figures, it is surely inequitable that taxation should be levied on values which are at least problematical and which many believe there can be no prospect of satisfying unless the War Damage Acts are further amended and the taxpayer comes to the relief of the fund.

Assurances were, I believe, given by the Government that the burden should not rest where the loss fell, but should be spread evenly over the community. It is surely high time that the Chancellor of the Exchequer made some definite pronouncement on this subject with a view to allaying the very justifiable anxieties of those called upon to pay tax on figures which they believe to be wholly problematical.

Bath. GEO. E. HUGHES.
14th September.

Law of Libel.

Sir,—I observe that in a letter published in your issue of 11th September, Mr. G. W. R. Thompson says that "the defence of 'fair comment' is not permitted at common law or by any statute, so that it depends on case law, and, so far as I am aware, not even on the decision of an appeal court." It would be interesting to know what the writer had in mind. In particular, if the defence of fair comment rests on case law, how comes it that such cases, on libel, were (apparently) not decided at common law? And was not the exhaustive discussion of this defence by the House of Lords in *Sutherland* v. *Stopes* [1925] A.C. 47, discussion by an appeal court? It is all the more puzzling that *Lyon and Another* v. *Daily Telegraph*, to which the writer refers, was itself decided by the Court of Appeal.

13th September, 1943. CONVEYANCER.

War Legislation.

STATUTORY RULES AND ORDERS, 1943.

E.P. 1273. **Apparel and Textiles.** Footwear (Rubber and Industrial) (No. 6) Directions, Sept. 6.

E.P. 1291. Apparel and Textiles. Utility Apparel (Specification Number) (No. 2) Directions, Sept. 6.

E.P. 1271–2 (as one publication). **Consumer Rationing.** Orders, Sept. 2, 1943. 1271 amending Licences, Aug. 29, 1942, and Jan. 7, 1943; 1272 amending Licences, Aug. 25, 1942, and Dec. 31, 1942.

E.P. 1261. **Control of Packaging** (No. 3) Order, Aug. 26.

No. 1283/L.24. **County Court, England.** County Court Districts (No. 2) Order, Sept. 1.

E.P. 1268. **Delegation of Emergency Powers** (Ministry of Commerce for N. Ireland) Order, Aug. 23.

E.P. 1278. **Employment of Women** (Control of Engagement) (Amendment) Order, Aug. 31.

E.P. 1275. **Flour Order,** 1943. Amendment Order, Aug. 31.

No. 1243. **Goods and Services** (Price Control). Boot and Shoe Repairs (Maximum Charges) Order, Sept. 2.

No. 1250–51 (as one publication). Goods and Services (Price Control). 1250 Miscellaneous Goods (Import and Prevented Export) (Maximum Prices) Order, Sept. 2; 1251 General Licence, Sept. 3 under the Price Controlled Goods (Restriction of Resale) (No. 2) Order, 1942.

No. 1274. Goods and Services (Price Control). Utility Footwear (Maximum Prices) Order, Sept. 2.

No. 1279. **Motor Vehicles** (Construction and Use) (Amendment) (No. 2) Regulations, Aug. 30.

PROVISIONAL RULES AND ORDERS, 1943.

Road Traffic and Vehicles. Motor Vehicles (Construction and Use) (Amendment) (No. 3) Provisional Regulations, Sept. 4.

STATIONERY OFFICE.

List of Statutory Rules and Orders. August, 1943.

WAR OFFICE.

Regulations for the Home Guard, 1942. Vol. I, Amendments 6, Aug., 1943.

Notes of Cases.

COURT OF APPEAL.

Speed *v.* Thomas Swift & Co., Ltd.

Lord Greene, M.R., MacKinnon and Goddard, L.JJ. 21st April, 1943.

Negligence—Failure of employer to provide safe system of working—Duty delegated to foreman—Defence of common employment not available—Definition of "safe system of working."

Defendants' appeal from a judgment of the Assistant Presiding Judge of the Liverpool Court of Passage.

The plaintiff was injured in an accident which occurred while he was working for the defendants in loading a ship. The starboard rail had been cut by an oxy-acetylene cutter, with the result that one end of it was in the air instead of being attached to the adjoining section of the rail in the usual way. The learned assistant judge found that there were three elements of danger in the operation in which the plaintiff was engaged: (1) the defective working of the port winch; (2) the condition of the starboard rail; and (3) the presence of a quantity of damage on the deck beside the rail.

LORD GREENE, M.R., said that there was ample evidence on which the learned assistant judge could find as he did with regard to these dangers. The real question was whether or not failure to remove or protect the rail constituted the system of working an unsafe one. On the one hand, it was said that the system of working manned gear was one under which the rail was not removed or protected, and if special reasons existed for removing it in a particular case, the decision rested with the foreman, and if he failed to do so, the fault was his alone. On the other hand, it was said that the duty of providing a safe system must be considered not generally, but in relation to the particular circumstances of each job, and that in the present case the circumstances were such as to call for the removal or protection of the rail. In his lordship's opinion the latter view was the correct one. It was the master's duty to provide a safe system of working, and he could not excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty (*Wilson and Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57). His lordship referred to the definition of system by the Lord Justice Clerk in *English* v. *Wilsons and Clyde Coal Co., Ltd.* [1936] S.C. 833, at p. 904, and said that though he did not venture a definition of system, it might include, according to circumstances, such matters as the physical lay-out of the job, the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. It might be adequate for the whole course of the job, or it might have to be modified or improved to meet circumstances which arose and such modifications and improvements equally fell under the head of system. These examples were not intended to be exhaustive, but were given to bring out the point that the safety of a system must be considered in relation to the particular circumstances of each particular job. In the present case, in laying out the job it was the master's duty to take what in the circumstances would have been the reasonable step of removing or protecting the rail; by leaving the decision to the foreman (if indeed it was left) the master was delegating the duty of providing a safe system of working. The appeal would be dismissed.

MACKINNON and GODDARD, L.JJ., delivered assenting judgments to the like effect.

COUNSEL: *G. Glynn Blackledge; Edward Wooll.*

SOLICITORS: *Gregory, Rowcliffe & Co.*, for *Barrell, Son & Co.*, Liverpool; *Silverman & Livermore.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

Royal Choral Society *v.* Inland Revenue Commissioners.

Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.
31st May, 1st June, 1943.

Revenue—Income tax—Choral society—Established for advancement of choral singing in London—Whether sole purposes of society educative and therefore charitable within meaning of statutory provisions—Whether decision of Special Commissioners as to charitable nature for the purposes of society decision of law or fact—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37.

The society was formed for the purpose of the advancement of high-class choral singing in London. It had carried out that purpose since the year 1871 by the formation and training of a large choir and by the performance in public by that choir of celebrated choral works. By one of the rules of the society it was provided that the whole of its income was to be used in the promotion of the society's objects. It was contended, on behalf of the society, that it was established for charitable purposes only, and that its income was exclusively applied for such purposes within the meaning of s. 37 of the Income Tax Act, 1918, as those purposes were educative not only as regards the members of the society and of the choir, but also as regards the public who came to listen to its performances, and therefore the profits of the society were exempt from taxation. It was, on the other hand, contended on behalf of the Crown that the chief purpose of the society was to provide amusement and relaxation, and therefore the purposes of the society were not solely educative and it was not, in consequence, established for charitable purposes only. The Special Commissioners held that the society was not established for charitable purposes only within the meaning of the section, and therefore its profits were liable to tax. On appeal, before Macnaghten, J., it was further contended, on behalf of the Crown, that the decision of the Commissioners was a decision of fact from which there was no right of appeal. Macnaghten, J., held that the society was established for charitable purposes only, and he allowed the appeal. The Crown appealed from the decision of Macnaghten, J.

LORD GREENE, M.R., in dismissing the appeal, said that in view of the particular activities of the society, its objects were educative not only

in respect of its members and its performers, but also in respect of the public before whom the performances were given. The society, therefore, was established for charitable purposes only, and its profits were not liable to taxation. The decision of the Commissioners was a decision of law from which there was a right of appeal, for the question whether a particular association was formed for charitable purposes was a question of law.

MACKINNON and DU PARCQ, L.JJ., gave judgments to the same effect.

Appeal dismissed.

COUNSEL: *Solicitor-General* (Sir David Maxwell Fyfe), K.C.; *J. H. Stamp* and *R. P. Hills*; *Cyril King*, K.C., and *Frederick Grant*.

SOLICITORS: *Solicitor of Inland Revenue*; *Phillips, Cummings & Ashton*.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

MacKillop *v.* Inland Revenue Commissioners; Inland Revenue Commissioners *v.* MacKillop.

Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.
4th and 7th June, 1943.

Revenue—Income tax—Income from possessions outside United Kingdom—Taxpayer resident outside United Kingdom, but British subject—Income of taxpayer partly from United Kingdom sources and partly from sources outside—Method of calculating tax—Whether in calculating tax from total income Dominion tax relief should be deducted—Whether in computing income outside United Kingdom whole income or only income remitted to United Kingdom should be included—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Case V, r.* 2—*Finance Act*, 1920 (10 & 11 *Geo.* 5, *c.* 18), *ss.* 24 (1), 27.

Appeal from the decision of Wrottesley, J.

M made an application before the Special Commissioners for relief from income tax for the year 1935–36 in respect of Army pay under the provisions of the Finance Act, 1920, s. 24 (1), and the Finance Act, 1926, s. 20. He was a British subject and was an officer in His Majesty's Army, and in the course of military service was absent from this country from October, 1933, to July, 1937. His and his wife's income during the relevant period was derived from (1) Army pay from United Kingdom sources; (2) colonial allowance; (3) income from New Zealand sources, a small part of which only was remitted to the United Kingdom, and the greater part of which did not arise from stocks, shares or rents, and therefore most of their New Zealand income fell to be dealt with under Sched. D, Case V, r. 2, under which the only tax exigible against him in respect of that income was in respect of the remittances to the United Kingdom. For all practicable purposes, as M and his wife were not resident in the United Kingdom, no tax had been paid in respect of income under (2) and (3). In computing the tax payable in respect of (1), M was entitled to the benefit of the proviso to s. 24 (1), Finance Act, 1920. The relevant part of that subsection provides that no allowance in respect of earned income and no deduction from assessable income shall be made, and the reduced rate shall not be applicable on the first £250 in respect of an individual who is not resident in the United Kingdom, but by the proviso it is provided that the subsection shall not apply to a British subject: "so, however, that no such allowance, deduction, reduction of rate . . . shall be given so as to reduce the amount of the income tax payable . . . below an amount which bears the same proportion to the amount which would be payable by him by way of tax if the tax were chargeable on his total income from all sources, including income which is not subject to income tax charged in the United Kingdom, as the amount of the income subject to income tax so charged bears to the amount of his total income from all sources." The tax payable by M was, therefore, calculated in accordance with the following formula: Army pay (total income from all sources), multiplied by the amount of tax appropriate to total income after giving the allowances and deductions specified in s. 24. In computing the tax payable under the above formula, on the amount of total income from all sources the Crown did not deduct the relief which was given by s. 27, Finance Act, 1920, in respect of Dominion tax, and the Crown only deducted the reliefs specified in s. 24. M claimed to have the Dominion tax relief deducted as well. He also contended that in computing his total income from all sources there should be excluded the income from possessions outside the United Kingdom, which was governed by Sched. D, Case V, r. 2, except that part of such income which was remitted to the United Kingdom. The Commissioners found against M on both his contentions. Wrottesley, J., held that the Crown should have deducted the relief in respect of Dominion tax, but he held that all the income, both under (2) and (3), was to come into the calculation. M appealed on the second contention, and the Crown appealed on the question of the deduction of Dominion tax relief.

LORD GREENE, M.R., said that, in examining the language of s. 24, it appeared that one must carry the hypothesis under which one is treating the entire income as subject to United Kingdom tax to its logical conclusion, and calculate the amount by reference to all reliefs including that of Dominion tax relief. The appeal of the Crown on this point would therefore be dismissed. As regarded the contention by M that only that part of the income from (2) and (3) which was remitted to the United Kingdom should come into the calculation, the language of s. 24, in its natural grammatical meaning, meant that all the taxpayer's income, including that upon which he is not taxed, should be brought into the calculation. M's appeal on this point would therefore also be dismissed.

MACKINNON and DU PARCQ, L.JJ., concurred.

Appeal and cross-appeal dismissed.

COUNSEL: *The Solicitor-General* (Sir David Maxwell Fyfe), K.C., and *R. P. Hills*.

SOLICITOR: *Solicitor of Inland Revenue*.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

Executrices of Corbett *v.* Inland Revenue Commissioners.

Scott, MacKinnon and Luxmoore, L.JJ. 5th, 6th May, 9th June, 1943.

Revenue—Sur-tax—Avoidance of taxation—Statutory provisions to prevent avoidance of taxation—Transfer of assets abroad—Associated operations—Special Commissioners' finding of fact—Finance Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 34), *s.* 18.

Appeal from the judgment of Macnaghten, J.

An additional assessment to sur-tax was made upon the executrices of C for the year 1935–36 in the sum of £566. The question at issue was whether certain income producing assets held by a Canadian company called the D company came into its ownership in circumstances which, by reason of the special provisions of the Finance Act, 1936, s. 18, cast liability to tax upon C's executrices. The section begins as follows: "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:—" Subsequently subs. (7) was added, which creates similar liability in respect of sur-tax. The relevant subsection of s. 38 for the purpose of this case is subs. (1), which provides that where an individual, ordinarily resident in the United Kingdom, has by means of transfer of assets, by virtue or in consequence of which in conjunction with associated operations, income becomes payable to a person resident or domiciled out of the United Kingdom, acquired rights by virtue of which he has power to enjoy, whether forthwith or in the future, income of such a person out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to tax, that income shall (in effect) be chargeable. C was one of the six children of a testator who had left his residuary estate to trustees to be divided equally among them. By deed of family arrangement made in 1933 the trustees were released and the bulk of the investments and certain sinking fund policies were transferred to an English company W. As the English income tax law did not allow any relief in respect of the payment of premiums on sinking fund policies, the six beneficiaries in 1935 transferred to the Canadian D company the policies and enough foreign investments to ensure that the income therefrom would pay the premiums. The Special Commissioners and Macnaghten, J., held that the transaction came within the mischief of s. 18 and held that C's executrices were liable for sur-tax on the share of the income of the foreign investments which had been transferred to the Canadian company.

SCOTT, L.J., in delivering the judgment of the Court of Appeal, said that there was ample evidence before the Commissioners that the admittedly associated operation of the transfer to the Canadian company had, in conjunction with the previous transfer to the W company, the substantial results stated in the finding of the Commissioners, and as their finding was one of fact there was no right of appeal therefrom. Furthermore, the section did not impose on the Commissioners the duty to establish the existence of any intent in the taxpayer's mind to avoid liability to tax. It was enough for them to establish the fact that the necessary result of the relevant transactions had followed from them. Furthermore, the fact that C, as owner of only one-sixth share in the assets, had not full power of control over the transactions did not prevent him from "enjoying" the income within the meaning of subs. (1), for all the shareholders had a common interest and had to pull together in order that each might severally attain the desired result, of avoidance of taxation, and if the common sense inference that they would vote together could be disregarded, each shareholder would escape taxation by pleading inability to control the others. It followed that the appeal would be dismissed.

COUNSEL: *Cyril King*, K.C., and *L. C. Graham Dixon*; *The Attorney-General* (Sir Donald Somervell), K.C., *J. H. Stamp* and *R. P. Hills*.

SOLICITORS: *Slaughter & May*; *Solicitor of Inland Revenue*.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

APPEALS FROM COUNTY COURT.

Laurence *v.* Johnson.

Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.
5th July, 1943.

Landlord and tenant—Rent restrictions—Emergency legislation—Contract made after commencement of war—Unable to pay owing to circumstances arising before contract made—Application of Courts (Emergency Powers) Act—Courts (Emergency Powers) Act, 1943 (6 & 7 *Geo.* 6, *c.* 19).

Plaintiff's appeal from an order of the county court judge sitting at Brentford County Court.

The appellant was landlord of a dwelling-house, and the respondent, who did not appear on the appeal, was the tenant. The rent originally fixed by the tenancy agreement of 23rd June, 1941, was £65 per annum, the standard rent being £110 per annum. There had been previous proceedings by the appellant, after a two months' notice to quit, and in that action the standard rent was fixed at £110 and there was judgment for some arrears. The appellant had previously on 23rd March, 1942, given the respondent the option of staying as tenant at £110 per annum, and the respondent had stayed on, but had refused to pay this rent. On 13th March, 1942, the respondent was called on to report for military service. On 24th November, 1942, the present action for possession and £36 16s. 8d. arrears of rent was begun. The judge held that s. 26 of the Liabilities (War-Time Adjustment) Act, 1941, applied, that being the section which extended the Courts (Emergency Powers) Acts to contracts made after the commencement of the war. He did not, nor was he asked to treat the case as one in which he was to exercise his powers in relation to suspension of

orders for possession under the Rent Restrictions Acts. The judge held that under s. 26, he was entitled to make the order, and he accordingly made an order for possession in twenty-eight days, suspended on payment of £6 5s. 10d. rent per month, the first payment to be made on 23rd February, 1943. This was rather more than the original rent of £65 per annum, but substantially less than the standard rent of £110 per annum. He made no order with regard to the payment of £32 16s. 8d. for which the appellant got judgment, but did not obtain leave to proceed.

LORD GREENE, M.R., said that in his opinion the county court judge had no evidence before him to justify him in treating the case as one falling within s. 26 of the 1941 Act. The actual tenancy at the relevant date was a new tenancy entered into on 23rd March, 1942, on which date the tenant, having been given the option of staying on at the increased rent, stayed on but refused to pay this rent, which was in fact the standard rent. The tenant had been called up ten days previously, and the tenancy was therefore made with full knowledge of what the circumstances were, and what they were likely to be in the near future. There was not a particle of evidence to show that the circumstances which made him unable to pay the rent or satisfy the judgment for arrears were circumstances which arose after the tenancy. There was therefore no jurisdiction under s. 26 of the 1941 Act either to refuse leave to proceed on the judgment or to suspend the order for possession in the way the county court judge did. The only jurisdiction which the county court judge had depended on was the Rent Restrictions Acts, 1923, s. 4, and, with regard to the arrears, on the County Courts Act, 1934, s. 96. In considering the ground for suspending or postponing the operation of a judgment for possession under s. 4 of the 1923 Act, regard should be had to the relative circumstances of the two parties, and in particular to the fact that the respondent did not appear to merit sympathetic treatment, because, with his eyes open, he took a house which was far above his means. The county court judge was not justified in doing more on the facts than to suspend the order for possession so long as the current rent from time to time at the proper rate of £110 was paid. With regard to the judgment for the arrears the matter should go back to the county court judge with the direction that s. 26 of the 1941 Act, now embodied in the Courts (Emergency Powers) Act, 1943, did not apply to the present case.

MACKINNON and DU PARCQ, L.JJ., concurred. Appeal allowed.

COUNSEL: *B. Mark Goodman.*

SOLICITORS: *Zefferti, Heard & Morley Lawson.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

T. R. Pickford *v.* Mace.

Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.
14th July, 1943.

Landlord and tenant—Rent restrictions—Grounds for possession—Dwelling-house required for occupation by prospective employee—Certificate of county agricultural committee—No need to state name of prospective employee in certificate—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, Sched. I, para. (g).

Plaintiffs appeal from an order by the county court judge sitting at Witney County Court.

One order was made in an action for possession of a farmhouse known as Malthouse Farmhouse, where the plaintiffs farmed 500 acres, originally consisting of Yew Tree Farm and Malthouse Farm. The defendant, a lady, lived in the Malthouse Farmhouse with a brother and a lodger, and at the time of the hearing was a statutory tenant. The plaintiffs asked for possession in order to instal an agricultural foreman whom they had engaged in the expectation of obtaining possession of the farmhouse. The foreman at the date of the hearing was living apart from his family in a boarding-house, owing to possession of the farmhouse not being available. Under Sched. I of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, a number of circumstances are set out in which, if the court consider it reasonable to do so, it has power to make an order for recovery of possession without proof of alternative accommodation. The relevant circumstances alleged in the present case were in para. (*g*), where the dwelling-house was "reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment . . . or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into, and either . . . (ii) the court is satisfied by a certificate of the county agricultural committee (now the war agricultural executive committee) . . . that the person for whose occupation the dwelling-house is required by the landlord is, or is to be, employed on work necessary for the proper working of an agricultural holding." In the present case the certificate did not state the name of any person for whose occupation the dwelling-house was required, and at the foot of the certificate appeared a note that the certificate was granted on the understanding that the Court of Appeal in *Knight* v. *Winter* (1942), unreported, ruled that it was not necessary for the name of the person for whose occupation the cottage was required to be inserted in the certificate. The county court judge held that no contract had been made provisionally or otherwise to engage the foreman, and that the person referred to in the certificate must be identifiable as the actual person in respect of whom the application was made.

LORD GREENE, M.R. (after examining para. (*g*) of the First Schedule of the 1933 Act), said that it was for the county court judge on evidence in the ordinary way to be satisfied that the house was required for a person who was or was to be employed, and he had to be satisfied with the certificate as to the nature of the work on which that person was to be employed. It mattered not a bit that, at the date when the certificate was obtained, no person was in contemplation. It was unquestionably the duty of the committee to consider what was the work for which it was alleged a person was necessary. The omission to put the words "agricultural foreman" and the insertion instead of the words "agricultural worker" in the certificate, still left it open to identify the particular type of worker there referred to. This could have been done and would have been done if the point had been taken in the county court. His lordship referred to *Knight* v. *Winter* (24th April, 1942, unreported), a decision of a Court of Appeal consisting of MacKinnon, L.J., Lord Clauson and Goddard, L.J. A very short note of it appeared in *The Estates Gazette*. The decision was exactly in point and was right. The appeal would be dismissed and an order for possession would be made.

MACKINNON and DU PARCQ, L.JJ., delivered judgments to the like effect.

COUNSEL: *A. T. Denning*, K.C., and *A. Safford*; *Ronald Hopkins.*

SOLICITORS: *Stafford Clark & Co.*, for *Soanes & Welch*, Witney; *Preston, Lane-Claypon & O'Kelly*, for *Andrew Walsh & Son*, Oxford.

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

Rules and Orders.

S.R. & O., 1943, No. 1283/L. 24.

COUNTY COURT, ENGLAND.

COURTS AND DISTRICTS.

THE COUNTY COURT DISTRICTS (NO. 2) ORDER, 1943.

DATED SEPTEMBER 1, 1943.

Whereas owing to war conditions it is expedient that the business of certain County Courts should be concentrated in fewer places:

Now, therefore, I, John Viscount Simon, Lord High Chancellor of Great Britain, in exercise of the powers conferred upon me by the County Courts Act, 1934,* and all other powers enabling me in this behalf, do hereby order as follows:—

Marylebone and Bloomsbury.

1.—(1) The districts of the Marylebone and Bloomsbury County Courts shall be consolidated and a Court shall be held for the consolidated district and the Court Office shall be kept open, at 209 Great Portland Street, W.1, and the holding of the Marylebone County Court shall be discontinued and the Court Office at 179 Marylebone Road shall be closed.

(2) The Court held for the consolidated district shall have jurisdiction with respect to proceedings pending in either Court when this Order comes into operation.

(3) The Court for the consolidated district shall be held by the name of the Bloomsbury County Court:

Provided that no process shall be invalid by reason only that the Court is described therein as the Marylebone County Court.

(4) His Honour Judge Lilley and His Honour Judge David Davies, K.C., shall be the Judges for the consolidated district.

Southwark and Lambeth.

2.—(1) The districts of the Southwark and Lambeth County Courts shall be consolidated and a Court shall be held for the consolidated district, and the Court Office shall be kept open, at Cleaver Street, Kennington Road, S.E.11, and the holding of the Southwark County Court shall be discontinued and the Court Office at Swan Street, Trinity Street, S.E.1, shall be closed.

(2) The Court held for the consolidated district shall have jurisdiction with respect to proceedings pending in either Court when this Order comes into opearion.

(3) The Court for the consolidated district shall be held by the name of the Lambeth County Court:

Provided that no process shall be invalid by reason only that the Court is described therein as the Southwark County Court.

(4) His Honour Judge Konstam, C.B.E., K.C., shall be the Judge for the consolidated district and His Honour Judge Bensley Wells, M.B.E., shall sit as additional Judge at Lambeth County Court instead of His Honour Judge Drucquer.

Whitechapel and Shoreditch.

3.—(1) The districts of the Whitechapel and Shoreditch County Courts shall be consolidated, and a Court shall be held for the consolidated district, and the Court Office shall be kept open, at 19, Leonard Street, E.C.2, and the holding of the Whitechapel County Court shall be discontinued, and the Court Office at Prescot Street, E.1, shall be closed.

(2) The Court held for the consolidated district shall have jurisdiction with respect to proceedings pending in either Court when this Order comes into operation.

(3) The Court for the consolidated district shall be held by the name of the Shoreditch County Court:

Provided that no process shall be invalid by reason only that the Court is described therein as the Whitechapel County Court.

(4) His Honour Judge Engelbach shall be the Judge for the consolidated district and His Honour Judge Tudor Rees shall sit as additional Judge at Shoreditch County Court.

Beccles and Bungay.

4. The Beccles and Bungay County Courts shall cease to be held at Bungay and shall be held every month at Beccles by the name of the Beccles County Court:

Provided that no process shall be invalid by reason only that the Court is described therein as the Beccles and Bungay County Court.

Short Title and Commencement.

5. This Order may be cited as the County Court Districts (No. 2) Order, 1943, and shall come into operation on the 1st day of October, 1943.

Dated the 1st day of September, 1943. *Simon*, C.

* 24 & 25 Geo. 5, c. 53.